

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF HAWAII

JOHN TOMA,	)	
	)	Case No. CV16-00499RLP
	)	
Plaintiff,	)	July 18, 2018
	)	9:57 a.m.
vs.	)	
	)	
UNIVERSITY OF HAWAII,	)	
	)	U.S. District Court
Defendant.	)	300 Ala Moana Boulevard
	)	Honolulu, HI 96850
_____	)	

TRANSCRIPT OF HEARING ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT  
BEFORE THE HONORABLE RICHARD L. PUGLISI  
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For Plaintiff:	BRIAN K. MACKINTOSH, ESQ. 841 Bishop Street, Suite 2201 Honolulu, HI 96813
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For Defendant:	OFFICE OF GENERAL COUNSEL UNIVERSITY OF HAWAII 2444 Dole Street Bachman Hall 110 Honolulu, HI 96822
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1 JULY 18, 2018

9:57 A.M.

2 THE CLERK: All rise. The United States District Court  
3 for the District of Hawaii is now in session. The Honorable  
4 Richard Puglisi presiding.

5 THE COURT: Please be seated.

6 THE CLERK: Civil 16-00499RLP, John Toma v. The  
7 University of Hawaii. This case is called for a hearing on  
8 Defendant's motion for summary judgment. Appearances, please,  
9 counsel, for the record.

10 MR. MAYESHIRO: Good morning, Your Honor. Derek  
11 Mayeshiro on behalf of the University of Hawaii.

12 THE COURT: Good morning, Mr. Mayeshiro.

13 MR. MACKINTOSH: Brian Mackintosh on behalf of  
14 Plaintiff John Toma, who is in the audience.

15 THE COURT: Good morning, Mr. Mackintosh. All right.  
16 Mr. Mayeshiro, this is your motion.

17 MR. MAYESHIRO: Yes, Your Honor. Thank you. As the  
18 Court may recall, most of Plaintiff's prior claims were earlier  
19 dismissed in this case as being untimely. The Court applied a  
20 four year statute of limitations that essentially wiped out most  
21 of Plaintiff's claims, including any claims regarding his  
22 academic dismissal, which occurred on January 14th, 2011, and his  
23 subsequent academic internal appeals at the University, which  
24 occurred in the spring of 2011.

25 So, any claim that the Plaintiff had prior to September

1 11, 2012, are forever barred. So, then that begs the question,  
2 well, what's left. As pled, Plaintiff's claims are somewhat  
3 amorphous, but he does use the words "hostile education  
4 environment" in pleading his ADA claim, and his §504 claim. But  
5 the Court has previously ruled that because of Ninth Circuit  
6 precedent, the Court declined to recognize any type of hostile  
7 education environment claim, so those were dismissed.

8 Assuming that Plaintiff's remaining claim falls within,  
9 as pled, the hostile education environment, then the law of the  
10 case should apply to those claims -- remaining claims, and they  
11 should be dismissed as well. If, Plaintiff --

12 THE COURT: Mr. Mayeshiro --

13 MR. MAYESHIRO: Yes.

14 THE COURT: -- I think your law of the case argument  
15 is, I think, generally well taken, it's just that the -- you  
16 focus specifically and exclusively, I think, on Count 1 and Count  
17 2, and how they're worded, and they clearly do reference a  
18 hostile environment. But if you look at the -- the complaint is  
19 a very detailed one, right?

20 MR. MAYESHIRO: Yes, Your Honor.

21 THE COURT: It's an extremely detailed complaint,  
22 perhaps more detailed than we normally see. And when you focus  
23 on the time frame that is set forth in the complaint, given the  
24 -- our liberal pleading standards in federal court, I think he  
25 clearly makes out a claim that he was discriminated against

1 because of his disability through the acts of -- I believe it's  
2 Dr. Syrmos.

3 MR. MAYESHIRO: Yes, Your Honor.

4 THE COURT: Because that's the only fact in the  
5 complaint that would come on or after September 11th, 2012.

6 MR. MAYESHIRO: Yes, Your Honor. And to that point,  
7 Plaintiff continues to assert that the relevant program that the  
8 government entity here, the University, was providing, and he  
9 should have been able to participate in is the medical school, is  
10 JABSOM.

11 THE COURT: Right.

12 MR. MAYESHIRO: Under the ADA, it states: No qualified  
13 individual with a disability, and by reason of that disability,  
14 shall be excluded from participation in that government program.  
15 Plaintiff continues to assert JABSOM is the program at issue  
16 here. So, to that end, a qualified individual, as defined by the  
17 ADA, is someone who, with a disability, who meets the essential  
18 eligibility requirements.

19 But here, Plaintiff was dismissed beyond the statute --  
20 applicable statute of limitations. So, those claims are already  
21 gone. Plaintiff essentially tries to tie Dr. Syrmos' academic  
22 appeal in September 11, 2011 or '12, I believe.

23 THE COURT: '12.

24 MR. MAYESHIRO: '12. And, essentially, tries to tie  
25 that back in to the government program, which is the medical

1 school. However, that was a separate internal policy -- alleged  
2 policy violation that had begun after his academic appeals were  
3 already concluded.

4 So, because of his academic dismissal and because of  
5 the academic appeals, now all fall outside of the statute of  
6 limitations. The argument, therefore, is he cannot try to  
7 resurrect those claims by alleging a policy violation and tie  
8 back in the Medical School Program.

9 The University has set forth, in rather meticulous  
10 detail, the basis of his academic dismissal, if the Court had any  
11 concerns on that basis. But even assuming that Plaintiff alleges  
12 some type of specific discrimination in the appeals process of  
13 that separate internal UH policy, then that would arguably fall  
14 within the state two year statute of limitations.

15 The ADA does provide that, essentially, no disabled  
16 person shall be discriminated against by any such public entity.  
17 And if that's the provision under the ADA that we're going after,  
18 that provision was already there in the original ADA.

19 If the Court may recall, back in the prior motions to  
20 dismiss, the prior motions -- I believe it was motions for  
21 judgment on the pleadings. In those prior motions, Plaintiff  
22 basically alleged, well the episodic nature of his depression and  
23 the ameliorative affects of medication, still qualifies him as  
24 someone with a disability and, therefore, reasonable  
25 accommodations should have been met or should have been provided

1 to him. That was with respect to the medical school.

2           Plaintiff now alleges, in this separate internal UH  
3 policy investigation, and decision, and appeal that he was  
4 otherwise discriminated against, but in that arena, he has made  
5 no allegation that he was entitled to some type of accommodation.  
6 The accommodation that Plaintiff continues to assert is for his  
7 enrollment and his stay while participating at the medical  
8 school. In essence, he's arguing that he should have had more  
9 time to take the USMLE Step 1 Test, although he almost had two  
10 years to take that test, which we've outlined in our motion.

11           But when it comes to the remaining claim, if we are  
12 only talking about that former Vice Chancellor Syrmos  
13 discriminated against the Plaintiff, then that should have fallen  
14 in the two year statute of limitations, which is why it's a  
15 little amorphous the way the allegations are pled, albeit they  
16 are specific as far as dates, and times, and alleged specific  
17 acts.

18           But to the extent that the Plaintiff is continuing to  
19 argue accommodation for a particular program, there is no doubt  
20 that that program is the medical school and all of those claims  
21 regarding his academic dismissal fall outside the statute of  
22 limitations.

23           So, to the extent that Plaintiff is using this policy  
24 discrimination as a vehicle to resurrect his dismissal, then  
25 those claims should be dismissed, and we outlined -- because he

1 essentially does not meet the essential eligibility requirements,  
2 because he was previously dismissed and any claims and rights he  
3 had regarding that dismissal and his academic appeal fall beyond  
4 the statute of limitations.

5           So, I believe, that is Plaintiff's remaining argument,  
6 because he continues to assert reasonable accommodation at  
7 JABSOM. If Plaintiff had alleged he needed some type of  
8 accommodation, although I don't know what it would be, with  
9 respect to his appeal in the policy investigation, in the policy  
10 decision, and its ultimate academic -- or its ultimate appeal,  
11 then that might be a different story, Your Honor. But here, the  
12 program at question under the ADA is the medical school.

13           So, if Plaintiff's claim is something other than a  
14 request for accommodation at the medical school, then it must be  
15 a straight discrimination complaint under the ADA against former  
16 Vice Chancellor Syrmos, in which case that would fall under the  
17 two year statute of limitations, not the four year.

18           The alleged episodic nature and the ameliorative  
19 effects of medication that extended or that was in the amendments  
20 to the ADA, and thereby allowed Plaintiff to access the statute  
21 of limitations under 16 U.S.C. -- no, 28 U.S.C. 1658, those  
22 amendments dealt specifically with expanding the definition of  
23 disability to allow the government and the individual to have  
24 more accommodations provided.

25           In other words, if an individual had an episodic nature

1 of a condition, or if the individual has some type of disability,  
2 which was otherwise lessened by the effects of medication, he  
3 should still -- he or she should still be qualified as a disabled  
4 person under the ADA, and the government should still allow or  
5 provide reasonable accommodations in that context.

6 But here, if the remaining complaint is a straight  
7 discrimination complaint against the former Vice Chancellor, then  
8 that could have been brought under the original ADA, in which the  
9 State Court -- I'm sorry, the state statute of limitations of two  
10 years under H.R.S. 657-7, should apply given the Court's prior  
11 ruling.

12 THE COURT: All right. Thank you, Mr. Mayeshiro.

13 MR. MAYESHIRO: Thank you, Your Honor.

14 THE COURT: Mr. Mackintosh.

15 MR. MACKINTOSH: Good morning, Judge Puglisi.

16 THE COURT: Good morning.

17 MR. MACKINTOSH: I generally want to object because  
18 most of what Mr. Mayeshiro just went into was unargued and  
19 unbriefed. There wasn't an argument for a different statute of  
20 limitations, there wasn't a different claim that a two year ADA  
21 statute of limitation under the state should apply. And even if  
22 it had been briefed, my response, I think, would be the same. It  
23 doesn't make any sense.

24 The ADA Amendments Act, which the Plaintiff is bringing  
25 this case under expanded it to allow for episodic mental



1 disabilities, which the Plaintiff had. That episodic -- that  
2 expanded definition of disability wasn't there prior to that.  
3 Judge Dean Syrmos could not have relied on it or the earlier ADA.  
4 And so, anyway, I don't understand why someone with an episodic  
5 disability, being reviewed by Syrmos, would have a two year  
6 rather than a four year statute of limitations.

7           Secondly, Dean Syrmos was the ultimate fact finder.  
8 The dismissal was not final until the appeals were exhausted.  
9 Judge (sic) Syrmos had the discretion to review all of the facts.  
10 Not only did he have the discretion, he had the obligation to  
11 inform himself, under the law, of the facts of John Toma's case.

12           So, Wong v. Regents of the University of California,  
13 has two obligations that it imposes on a university. One is that  
14 it has to explore the alternatives with a student that is  
15 available to it. And one of those alternatives, would have been  
16 to repeat the first two years. If they were worried that his  
17 academic expertise or -- his academic knowledge wasn't fresh  
18 enough, they could have offered him to repeat that.

19           And, in fact, that has happened in Garcia v. State  
20 University of New York Health Sciences Center at Brooklyn, 280  
21 F.3d. 98. It was a very similar fact pattern. There was a  
22 mentally disabled person who, because of depression, wasn't able  
23 to complete his first two years and the State University of New  
24 York at Buffalo offered him to repeat those two, so that he would  
25 be fresh.

1           That was an alternative available to UH. They never  
2 explored that alternative with him and that failure to explore  
3 the alternatives means they don't reach the threshold of having  
4 met the requirements of the ADA.

5           Secondly, Dean Syrmos was required to inform himself of  
6 the facts of the case, which he did not, because he dismisses and  
7 says, it seems like you sporadically contacted Dean Antonelli,  
8 but you never really gave her letters from your doctor, but in  
9 fact he had given letters. He had put them on notice, he had  
10 documented his disability, and Dean Syrmos ignores that.

11           And, moreover, Dean Syrmos ignores the internally  
12 generated fact finder's report that University of Hawaii  
13 constructed and provided that found that John Toma likely had a  
14 disability and that disability could have been accommodated by  
15 providing an additional leave of absence. That accommodation was  
16 not provided and should have been. And that was from the Kokua  
17 Program, who was in charge of interpreting the ADA for the  
18 University of Hawaii.

19           The facts demonstrate that Dean Syrmos had the  
20 discretion and capacity to offer those accommodations. He should  
21 have, if he had done an adequate investigation of the facts and  
22 informed himself of the law. That was not done and because of  
23 that -- because of his failure to, on September 11, 2012, to  
24 inform himself of what was required John Toma, the Plaintiff, was  
25 discriminated.

1 THE COURT: Mr. Mackintosh --

2 MR. MACKINTOSH: Yes.

3 THE COURT: -- as far as the -- given the Court's prior  
4 ruling on the statute of limitations, the only specific claim of  
5 discrimination then would be that of the denial of your client's  
6 appeal of the finding of no discrimination by Drs. Hedges and  
7 Smerz.

8 MR. MACKINTOSH: That's the only thing alleged in the  
9 complaint. As I go through this voluminous record, I find all  
10 these emails from -- between Toma and Reed Dasenbrock, where Toma  
11 is requesting the fact finder's report and Dasenbrock refuses to  
12 provide it, refuses after three separate requests. For a period  
13 of weeks, Dasenbrock doesn't provide it to him and on the day  
14 that Toma's appeal is due, after -- hours after -- literally,  
15 like two hours after the time-stamps on the emails, then  
16 Dasenbrock provides the fact finder's report that justified  
17 Toma's appeal and would have provided additional facts.

18 I would ask the Court for leave to amend the second  
19 amended complaint to include that. It was in documents that I  
20 had, but it's just thousands of pages of documents, and I didn't  
21 see it until preparing for this motion.

22 THE COURT: Okay. But all of those specific complaints  
23 of not being provided the fact finder's report or your  
24 allegations that perhaps the report was concealed at some point,  
25 all of that came before the statute of limitations would have

1 run.

2 MR. MACKINTOSH: No, he was finally provided it on  
3 September 11 of 2012.

4 THE COURT: But the complaint is that wasn't provided  
5 beforehand would --

6 MR. MACKINTOSH: That's correct --

7 THE COURT: -- would be --

8 MR. MACKINTOSH: -- but the effect of concealing it  
9 until after the appeal was due, it only came to fruition and the  
10 effects were only felt on September 11th, when the denial came  
11 through.

12 THE COURT: Okay.

13 MR. MACKINTOSH: Yeah.

14 THE COURT: All right. Mr. Mayeshiro, anything  
15 further?

16 MR. MAYESHIRO: Yes, Your Honor, just briefly. With  
17 respect to the two year, versus the four year statute of  
18 limitations that I addressed, it was only in reference to the  
19 Court's inquiry. I believe, given the Court's prior ruling, and  
20 given the wording of the complaint, his remaining claim must  
21 still be trying to link Dr. Syrmos' academic appeals decision to  
22 participation at JABSOM.

23 And I would again submit that those claims had  
24 essentially been time barred because of the four year statute of  
25 limitations that was previously applied. Under the ADA, he must

1 be eligible or meet the essential eligibility requirements. And  
2 at the time Dr. Syrmos made his decision, he had previously been  
3 dismissed from JABSOM. And I do contest that if there is  
4 anything in the record that would suggest that Dr. Syrmos could  
5 have -- in a separate policy investigation, could have gone back  
6 to overrule the academic appeals decision regarding the  
7 dismissal, I don't believe there's anything in evidence regarding  
8 that particular claim. And without that tether, the claim should  
9 not survive.

10           With respect to any new claims that the Plaintiff  
11 wasn't provided the fact finder's report, that's something that  
12 the Plaintiff knew all along. They had more than ample  
13 opportunity to put that into the original complaint. We are now  
14 on our second amended complaint, and it's untimely to allege now  
15 that there's this new claim. And as the Court had suggested,  
16 because the denials actually still occurred before or beyond the  
17 four year statute of limitations, then those claims would be  
18 barred for that reason as well.

19           I think Plaintiff still has not established that  
20 particular tether between the program at JABSOM and Dr. Syrmos'  
21 decision. And any -- with respect -- I'm sorry. Just with  
22 respect to the two year and the four year statute of limitations,  
23 the four year statute of limitations only becomes effective under  
24 the amendments to the ADA, which in this case was specific to  
25 episodic depression and the ameliorative effects of medication.

1 To the extent Plaintiff tries to carve out some new claim, then I  
2 would argue that the two year statute of limitations should apply  
3 because any direct claim of discrimination by Dr. Syrmos could  
4 have been filed under the original ADA, as drafted. Thank you,  
5 Your Honor.

6 THE COURT: Okay. Thank you both. I appreciate that.  
7 Are you folks still set for a settlement conference with Judge  
8 Kurren the first week of August?

9 MR. MACKINTOSH: We are, Your Honor.

10 MR. MAYESHIRO: Yes, Your Honor.

11 THE COURT: Okay. All right. I'll give you all a  
12 chance to discuss matters with Judge Kurren and if that is  
13 unsuccessful in settling the case, then we'll issue a ruling  
14 shortly after that.

15 MR. MACKINTOSH: Could I just add, we did have a  
16 settlement conference, but it -- prior to this, and Judge Kurren  
17 postponed and offered a second settlement conference pending your  
18 ruling, because I think without a ruling on the MSJ, there's not  
19 a lot of flexibility on either of our positions.

20 THE COURT: All right. So, he -- are you telling me  
21 that he wanted a ruling before the settlement conference?

22 MR. MACKINTOSH: He thought it would be untimely, yeah.

23 MR. MAYESHIRO: That's my understanding as well, Your  
24 Honor.

25 THE COURT: Okay.

1           MR. MAYESHIRO: In addition, I'm sorry, Your Honor, on  
2 a sort of separate matter, counsel and I have spoken regarding  
3 the trial date continuance. The primary, I guess, remaining  
4 witness in this case, Dr. Syrmos, underwent a quadruple bypass  
5 and was unavailable for not just participation in this motion,  
6 which is why he was not referenced, but also any kind of  
7 deposition or discovery that the Plaintiff was seeking. So,  
8 because of his ailment, it did set back discovery.

9           THE COURT: Okay. Well, let's get through this part of  
10 the case first, and then, you know, I can address any extension  
11 at a later point.

12           MR. MAYESHIRO: Yes, Your Honor.

13           MR. MACKINTOSH: Thank you, Your Honor.

14           THE COURT: All right. Thank you all. Court's in  
15 recess.

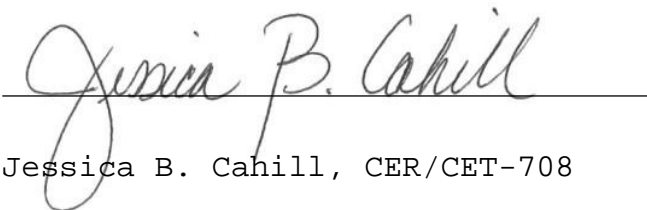
16           THE CLERK: All rise. This Court's in recess.

17           (Proceedings concluded at 10:19 a.m.)  
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## CERTIFICATE

I, Jessica B. Cahill, court approved transcriber, do hereby certify that pursuant to 28 U.S.C. §753, the foregoing is a complete, true, and correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated: September 24, 2018



Handwritten signature of Jessica B. Cahill in cursive script, written over a horizontal line.

Jessica B. Cahill, CER/CET-708